VIRGINIA LAW REGISTER

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The Antagonism of State and National Authorities.

One can hardly take up a paper now-a-days without reading of some clash between a Federal and State Court. Writs and counterwrits, arrests—habeas corpus—threats of the employment of Federal troops to coerce state officials acting under orders of a State Court—all these things seem to be growing. The whole miserable business is rapidly becoming a disgrace alike to the administration of justice and the personality of the judges and bringing the Courts into well-merited contempt.

In Georgia a United States Marshal was imprisoned by a state court for contempt in refusing to testify in a liquor case because by a rule of the department he was forbidden to "give away" the names of those obtaining Federal liquor licenses. A Federal Judge issued a writ of habeas corpus, which the State Judge directed the Sheriff to defy, and the State Court only gave way when threatened with "foot, horse and dragoon." Now the "Constitution and laws made in pursuance thereof are the supreme law of the land," but we cannot see how the rule of a department can be held to be superior to a Court of a sovereign State, and if the departments of the National Government can by their mere fiat add at will to the narrow list of privileged witnesses, the State Court may as well shut up shop when one of the employees of that Government is summoned before it. But at the same time the Federal Judge had a clear and undisputed right in the case mentioned to issue the writ of habeas corpus and the State Judge was foolish, if not worse, in directing his officials to disregard it.

And now in Iowa—thank Heaven, and not in the South—a mayor, deputy sheriff, chief of police, several policemen and saloon keepers have been indicted by the Federal Grand Jury, charged with jailing a special officer of the Government Indian Service, and conspiring to prevent him from doing his duty. We

have no sympathy with the officer. He sent an Indian in a saloon to buy liquor, knowing it was a violation of law thus becoming *particeps criminis* for the purpose of obtaining evidence against the saloon keeper. In this he was aided and abetted by a local minister of the Gospel who was thus exhibiting his love for his fellowman and who probably paid his first visit to "those in prison," when he was placed there along with his co-conspirator, the special officer, by the city officials. Both "clashes" mentioned grew out of prohibition or liquor laws—as to which more wise men become foolish, and more courts have rendered absurd and ridiculous decisions, and more legislatures have lost their heads than upon any other subject in this country. But is it not time that some legislation is devised on the part of Congress to define in some way the lines between the courts and prevent these painful and humiliating clashes? Surely some wise statesman, well versed in constitutional law, could devise a statute, to lessen if not to prevent, this growing evil.

Dehors the Record.

Our Supreme Court of Appeals has as a general rule kept to well-beaten paths in its decisions on questions which now fill quite an important place under the heading of "Intoxicating Liquors."

The general tendency of the Courts when a case under that head comes up, has been like the Irishman at Donnybrooke Fair, who never saw a head without hitting it. For the general public in many of the States seem to have gone as mad on the question of liquor as certain New England States some years agone went on the question of slavery. "Coorts," says Mr. Dooley, "administher aven and exact jestice timpered by pooblic opinion. Wan kin till the ooltimate rache of the Shuprame Coort's opinion by a careful inspection of the wind gauage of the incorruptible press and pooblic's notions."

Our own Court has generally and properly put the responsibility on the lawmaking power with the police power to fall back on. The case of Commonwealth *v.* Henry and Commonwealth *v.* Shannon, decided September 21st, reverses Judge Harrison in the case reported in the REGISTER, vol. 14, p. 596.

The opinion is an able one, yet we cannot but regret one par-

agraph therein. In alluding to the danger of allowing "malt beverages" to be sold without regulation of some kind, the Court says an illicit sale of ardent spirits might thereby be engaged in under the guise of doing a lawful business. "This has been the experience elsewhere, as clearly appears from the reported decisions of the courts of other states, *and it is a matter of common knowledge that it has recently been the experience in Virginia,*" (italics ours) says the Court. In the absence of the record we cannot say how the Court arrived at the conclusion that this was a matter of common knowledge in the experience of the people of this State, and we would be glad to know how that "common knowledge" came before the Court. How was it proven? By the "general muster" or by individual witnesses or expert testimony? If there is nothing in the record by way of evidence, did the Court take judicial notice of this "common knowledge?" Or is it one of those remarks that occasionally slip into an opinion before a thorough revision? If there was evidence of that "common knowledge" of the experience in Virginia, in the record, then the remark was eminently proper and justifiable. Otherwise it seems hardly in place in an opinion as ably conceived and rendered as the present one.

Evidence—of The Expert Kind —And Otherwise.

In the case of the Hot Springs Lumber, etc., Company *v.* Revercomb, decided September 21st, 1909, our Supreme Court has rendered a valuable and interesting decision, sustained alike by precedent and common sense. The Court holds that the qualification of a witness as an expert is a question addressed to the sound discretion of the trial court, which may be reviewed by the Court of Appeals under the usual limitations applicable to such a review, and where the witness testified to facts which plainly establish his expertness with respect to the matter about which he testified, the Supreme Court will overrule an exception to the admission of his testimony on the ground that it is unable to say as a matter of law that the discretion of the lower Court was improperly exercised.

The question before the trial Court was as to the power of a cer-

tain stream to float logs and whether it could be made subservient and useful to the public for the transportation of products, so as to constitute a public highway and not a private stream. The witness testified that he had made the floating of logs down mountain streams a part of the business of his life and that he was acquainted with the river in question. His evidence as to the "floatability" of that river was admitted and it seems to us properly so.

The object of all evidence is to get before the jury such a presentation of the facts upon which they are to render a verdict, as will permit them to view intelligently and judge impartially the whole case before them. They are to act, not as a sort of sublimated superior and godlike tribunal, but rather as man rendering judgment as men do with all the aids other men use to form a just opinion. In a large number of cases the jury cannot from the very nature of things reach a correct conclusion without the aid of the opinion of others. Why should they not have the benefit of that opinion? As well tell a man about to ford a stream he never saw before, and evidently above its normal flood, that he should not ask the opinion of a dweller on its banks as to whether in his opinion it was safe to cross. The traveller would act on that opinion or be a fool, and whilst opinions ought never to be received if all the facts can be ascertained and made clear to the jury without them, yet there are innumerable cases where only by the opinions of witnesses can the real facts be made to appear.

In our judgment the rules as to the admission of nonexpert opinions can be more safely widened than narrowed. Indeed as Wigmore has well said in his work on Evidence in § 1928, quoted in part by the Court: "If we prefer to make the rules of evidence our tools rather than to become ourselves their helpless slaves, then we shall allow the witness to state freely all the results which he is qualified to reach, and only now and then, when he comes to matters as to which it is instantly clear that the jurors are, or can be, as fully equipped with the data, we shall exclude his inferences."

And this leads us to refer to the fact that the nonexpert is

much more apt to form an unbiased and fair opinion than the paid professional. Indeed "expert testimony" is becoming little more than legalized subornation of perjury in many instances.

The Paid Expert.

So flagrant has become the abuse of the employment of witnesses, largely paid "to tell the truth upon the issue joined" that many of the local and State Bar Associations have appointed committees to take up the question of some remedy for this rapidly growing evil. Many suggestions have been made—some of them Quixotic, a few having the appearance of wisdom in some of the suggestions. One suggestion is that the Court alone shall call the expert in any case where an expert opinion is needed, allowing the cost for his services to be charged to either or both sides in its discretion.

Another is that the expert shall be summoned as any other witness and be allowed no other fee—on the ground that his testimony stands on no higher plane than that of man testifying to a fact. The latter would be like Glendower's summoning spirits from the vasty deep, with this slight difference, that they might come, but their testimony would not materialize.

So many difficulties surround the first proposition that it will require a wise head to work out a feasible plan. We think the profession should think over this whole matter carefully and consider ways and means, for the press, public, and juries often, are beginning to consider such testimony a mere farce.

Attorney General O'Malley in his address before the National Association of Attorneys General last summer, remarked:

"Generally speaking the history of enforcing laws in this country is a record of protracted litigation. If a Federal Statute, its provisions are assailed from the lowest to the highest Federal Court. If a State law its validity must be established in every State Court of the State enacting it, and oftentimes in every Federal Court before it is enforceable."

The Law's Delays.

That this is true no one can question. But what is the remedy? Less legislation, wiser legislation, more carefully considered legislation would do much to lessen the evil. "Seek the fountain

rather than the rivulet." Congress and the State Legislatures in their pandering to the cry for remedial legislation and in attempting to cure every so-called hard case by a statute, pass many an act so repugnant to the old fixed ideas of government that they must necessarily be questioned to the extreme limit by all who are affected by them. The Courts are not in fault; the lawmakers generally are.

But there is one delay in our Appellate Practice affecting our own State for which there should be some remedy. Why should a year be allowed any litigant in which to file a petition for an appeal? In this day of stenographers, typewriters, and linotype machines, six or even three months ought to be ample time to allow a defeated litigant to make up his mind. We respectfully call the attention of our lawmakers to this one cause of delay which can easily be cured by them.

And another cause of delay which affects quite a large portion of this State is the opportunity which the annual session of the Court of Appeals at Wytheville and Staunton gives to an appellant to delay the final hearing of a cause. Take an instance.

The Court meets in Wytheville in June. A case is tried in a County or City from which an appeal goes to the Court in Wytheville, say the last of May. The losing litigant postpones his application for an appeal until late in April of the next year. It is granted. He does not have to have the record printed in time for the June term and the case thereupon goes over until the following June, so that more than two years elapse before the rights of the parties can be finally determined. Could not the Court by some rule prevent a delay of this character? Ought not the attempt to be made at least?

Important Cases in the Pending Term of the Supreme Court of the United States.

Seldom has there ever been as many cases of the utmost importance upon the docket of the United States Supreme Court as at the term just fairly begun. The Sherman anti-trust law will have to run the gauntlet between the lines of the counsel for the American Tobacco Company and the Standard Oil Company.

The Interstate Commerce Commission's powers will be tested

in several important cases. One of these is the Williamette Valley case, another that of the Chicago & Alton against the Commission. The latter case and a similar case of the Illinois Central *v.* the Commission were heard as one case. The roads are seeking to annul the order of the Commission requiring certain cars to be counted in making coal car distributions. The lower court granted an injunction and the Commission appealed. This question is of much importance in all the mining regions of the United States, the Commission having endeavored to lay down a rule for coal car distribution which is equitable to all mines, whether patronized by the railroads or not.

The Southern Pacific case will go to the very existence of the Commission for the direct question of its right to regulate and fix railroad rates is involved in this case, which was certified to the Supreme Court by the Circuit Court in Northern California. The Southern Pacific and the Oregon & California Railroad are arrayed against the Commission in this fight. The lower Court was divided on decision two to one. It is thought possible that the Court may remand this case, and if so, the question of legality of the Commission's power to fix rates will rest in the decision of the Missouri River rate cases, recently passed upon adversely by the Commission.

Another important case upon the docket is the famous Chicago live stock terminal charge case. This is the case of Stickney and others *v.* the Commission, a bill to annul the order of the Commission requiring carriers to desist from exacting the $2 terminal charge on each car of live stock sent into Chicago from western territory. In this case the Circuit Court at St. Paul granted an injunction to the roads and the Commission is appealing.

Still another in which the Commission is defendant is known as the Portland Gateway case. It is that of the Northern Pacific *v.* the Commission. A temporary restraining order has been granted in the Circuit Court at St. Paul and the case has been appealed to the Supreme Court. The bill is to annul the order of the Commission requiring the Chicago and North Western, the Union Pacific, the Oregon Short Line, the Oregon Railroad & Navigation Company and the Northern Pacific to establish through rates and joint rates for the transportation of passengers and their baggage between Chicago and other points to points in

the State of Washington via Portland, Ore. This case raises vital questions as to the powers of the Commission in establishing through routes and joint rates.

A case of decided interest to the editorial fraternity is the Monon route case, in which the government is attempting to make the C. I. & L. Railway Company desist from accepting advertising in payment for transportation.

Surely we may expect learned and far-reaching decisions, and dissenting opinions.

Venue for Criminal Prosecution in Libel.

In the case of United States *v.* Delevan Smith and Charles R. Williams, proprietors of the *Indianapolis News,* who were indicted in the District of Columbia, charged with having committed a criminal libel in publishing articles, alleging that there was a corrupt profit of twenty-eight million dollars in the sale of the Panama Canal to the United States, Judge Anderson of the United States Court in Indianapolis dismissed the proceedings and refused to allow the removal of the cause to the District of Columbia for trial. Judge Anderson states that he only wrote a hasty opinion, and a perusal of it we think seems to make one wish that the Judge had written it with a little more care. He is of the opinion that to call a person a thief and a swindler does not constitute libel *per se* and that it was the duty of a newspaper to print the truth and to tell the truth about it, but the important part of the decision is that the Judge holds that the paper in which these so-called libellous articles were published, was published in the City of Indianapolis, Indiana, and although about fifty copies were sent by mail to the District of Columbia to subscribers there, this did not constitute the publication of a libel in the District of Columbia. The proud bird of freedom gives a few shrieks as might be expected, in the opinion, as follows:

> "That man has read the history of our institutions to little purpose," said Judge Anderson in concluding his decision, "who does not view with apprehension the success of such a proceeding as this to the end that citizens could be dragged from their homes to the District of Columbia, the seat of Govern-

ment, for trial under the circumstances of this case. The defendants are discharged."

The position of the libelled persons, seemed not to appeal to the judge, and personally all of us have a natural tendency to agree with him, as to the dragging of the accused from their homes.

But there is a very serious question as to whether the learned Judge did not err, and he certainly is not supported in the latter part of his opinion by the weight of authority.

By the constitution of the United States, art. 3, § 2, sub-div. 3, it is provided that:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the congress may by law have directed."

And there is no doubt that the circulation of a periodical in any county or state is sufficient to sustain an action for its publication in such county or state. Bailey *v.* Chapman, 38 S. W. 544, 546, 15 Tex. Civ. App. 240. Citing Root *v.* King, 4 Cow. 403; Lucan *v.* Cavendish, 10 Ir. Law. Rep. 537; Pinchney *v.* Collins, 1 Term R. 647, note; Com. *v.* Malcoon, 101 Mass. 6. Same point decided in Belo *v.* Wren, 63 Tex. 686. And see to same effect Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15. For it is not the place where the libelous article is printed, but the place where it is published and circulated, that makes the words used actionable. Haskell *v.* Bailey, 25 U. S. App. 99. Some state statutes require an action for libel to be brought in the county where defendant resides, thus implying a contrary rule at common law. So in Iowa. See Hall *v.* Boyce, 54 Ia. 136, 6 N. W. 177.

These are all civil cases, but they are authority upon the question of where the publication occurs. There is no dearth of criminal cases, however. Thus, if a libel is published at defendant's request in a public newspaper in one state, which newspaper usually and in the particular case circulates in another state, it constitutes a publication in the latter state, also. Com. *v.* Blanding, 3 Pick. (Mass.), 304, 15 Am. Dec. 216, citing and following Rex *v.* Burdett, 4 Barn and Ald., 95, 6 E. C. L. 404. And the

Amer. and Eng. Encyclopedia of Law (vol. 18, p. 1119), states that the mailing of libelous matter is a publication both in the jurisdiction when it is mailed and in that when it is received by the addressee. See Rex *v.* Burdett, 4 B. A. Ald. 95, 6 E. C. L. 404; Ward *v.* Smith, 6 Bing. 749, 19 C. E. L. 222, 4 M. & P. 595, 4 C. & P. 302, 19 E. C. L. 396; Irvine *v.* Duvernay, 4 Quebec, 85, 1 Montreal Leg. N. 138; Mills *v.* State, 18 Neb. 575. See, also, Com. *v.* Dorrance, 14 Phila. (Pa.), 671, 36 Leg. Int. (Pa.), 158.

As supporting the right to remove to the District of Columbia, for trial, the case of a defendant prosecuted for criminal libel committed there by publication there, see In re Buell, Fed. Case No. 2102, 4 Fed. Cases, 588. Here the accused was discharged because of defects in the indictment.

We expect to annotate this case more thoroughly when we have the full text of the opinion for publication next month.

Effect of Creditor's Suit on Time Limit for Maturing Supply Lien.

In the September number (ante, p. 392) we may have made rather too broad a statement as to the exact status of the claim of a supply-man, who has not yet filed his memorandum, during the time allowed for filing the same. He certainly has something, and we probably should not have said that he has, "no lien, only the possibility of one in a certain event," taking "lien" to mean a "hold" or "claim" to property for his security, which cannot, at the time in question, be taken from him. We meant no lien capable of enforcement, and in this sense it is true, and we do not think that this distinction of terms affects the real question at issue, although we are glad to have had our attention called to it by Mr. Hughes (see ante, p. 492).

The gist of the two sections seems to us to be this: such a supply-man "shall have a prior lien" (§ 2485), which he "shall be entitled to," i. e., entitled to enforce, if he, within ninety days, etc., file the memorandum; and "any such lien may be enforced in a court of equity" (§ 2486). He is given a *hold* upon the property which will automatically relax unless he files the memoran-

dum within the time, and such filing will lock his hold so that it becomes permanent and enforcible.

While the case of Savings Bank *v.* Powhatan Clay Co., 102 Va. 274, 46 S. E. 294, is not precisely in point, yet it, we think, supports the view we have taken of this question on the merits, in that it clearly holds that a right given by statute must be taken as the statute gives it, with any limitations which the legislature has chosen to place upon it, citing several cases and quoting from Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431, thus: "It (a cause of action given by statute) must be accepted in all respects as the statute gives it. And that this applies where the right is claimed in the federal courts, is shown by the cases of The Harrisburg, 119 U. S. 199, 30 L. Ed. 358, and Finnell *v.* Southern Kansas R. Co. (C. C.) 33 Fed. 428, both cited approvingly in Savings Bank *v.* Powhatan Clay Co., supra.

It would seem to us that the principle of the suspension of the statute of limitations by the filing of a creditor's suit, in federal or state court, should be confined, like the rule that a statute of limitations must be specially pleaded and cannot be availed of by demurrer, to the cases where the statute "is a pure statute of limitations and affects the remedy merely," and should not apply to any such statute "which is of the essence of the right," such as the statute requiring the filing of the memorandum clearly is here.